No. 84-713

FEB 5 1985

ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DISTRICT LODGE NO. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner

v.

TWA SERVICES, INC.;
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION;
and RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY TO BRIEFS IN OPPOSITION

MOZART G. RATNER
Counsel of Record
1900 M Street, N.W.
Washington, D.C. 20036
(202) 223-9472

JOSEPH P. MANNERS
General Counsel
IAMAW
1300 Connecticut Ave., N.W.
Washington, D.C. 20036

GEORGE H. TUCKER
MANNERS, TUCKER, CARRILLO & DAMOORGIAN, P.A.
123 Northwest 12th Avenue
Miami, Florida 33128

Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
REPLY TO GOVERNMENT BRIEF IN OPPOSITION	1
REPLY TO TWAS BRIEF IN OPPOSITION	9
CONCLUSION	11
APPENDIX 1—Supplemental Provisions "Final rule," 46 Federal Register 4320, January 16, 1981	1a
APPENDIX 2—46 Federal Register 49736-49762 (Explanation "Final rule"), 49762-49805 (Text), October 27, 1983, 29 CFR Part 4, revised as of July 1, 1984	2a
APPENDIX 3—Decision and Order *In the Matter of Eastern Service Management Company and Broadus Thompson,* Case No. SCA-352-355, filed December 7, 1974	6a
APPENDIX 4—Supplemental Decision and Order *In the Matter of Eastern Service Management Company and Broadus Thompson,* Case No. SCA-352-355, filed April 8, 1975	9a
APPENDIX 5—Excerpt From Letter To Unidentified Company, dated July 28, 1983, from Dorothy P. Come, Assistant Administrator, Wage and Hour Division, For William M. Otter, Administrator	11a

TABLE OF AUTHORITIES

Cases: Page

Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967) 8
Addison v. *Holly Hill Co.*, 322 U.S. 607 (1944) 3, 7
Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 3, 8
Batterton v. *Francis*, 432 U.S. 416 (1977) 1
Bose Corporation v. *Consumers Union*, —— U.S. ——, 52 L.W. 4513 (April 30, 1984) 7
Christian, G.L. & Associates v. *United States*, 100 Ct. Cl. 58, 312 F.2d 418, reargument denied, 160 Ct. Cl. 1, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963) 3, 5
Clark v. *Unified Services, Inc.*, 659 F.2d 49 (5 Cir. 1981) 10
Cort v. *Ash*, 422 U.S. 66 (1975) 9
Grace, W.R. and Co. v. *Local Union No. 759, Etc.*, —— U.S. ——, 51 L.W. 4643 (May 31, 1983) 8
General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976) 4
International Ass'n of Mach. & Aerospace Wkrs. v. *Hodgson*, 515 F.2d 373 (D.C. Cir. 1975) 9, 10
Iron Arrow Honor Society v. *Heckler*, —— U.S. ——, 78 L.Ed. 58 (Nov. 14, 1983) 6
Jackson Transit Authority v. *Transit Union*, 457 U.S. 15 (1982) 9, 10, 11
Machinists v. *Central Airlines, Inc.*, 372 U.S. 682 (1963) 10, 11
Merrill Lynch, Pierce, Fenner & Smith v. *Curran*, 456 U.S. 353 (1982) 9
Miscellaneous Service Workers, Local 427 v. *Philco-Ford Corp.*, 661 F.2d 776 (9th Cir. 1981) 9
Moore v. *Ogilvie*, 394 U.S. 814 (1969) 6
Morrison-Hardeman-Perini-Leavell v. *United States*, 392 F 2d 988, 183 Ct. Cl. (1968) 3
Motor Vehicle Manufacturing Assoc. v. *State Mutual Farm Automobile Insurance*, —— U.S. ——, 51 L.W. 4953 (June 24, 1983) 5

TABLE OF AUTHORITIES—Continued

	Page
NLRB v. *Dorsey Trailers, Inc.*, 179 F.2d 589 (5 Cir. 1950)	7
NLRB v. *Sears Roebuck & Co.*, 421 U.S. 131 (1975)	11
Norfolk & Western R. Co. v. *Nemitz*, 404 U.S. 37 (1971)	11
Textile Workers v. *Lincoln Mills*, 353 U.S. 448 (1957)	10
Universities Research Assn. v. *Coutu*, 450 U.S. 454 (1981)	3
Statutes:	
5 U.S.C. § 553(b)(A)	4
5 U.S.C. § 706(2)(A)(C)	4
29 U.S.C. § 185(b)	10
Service Contract Act	
41 U.S.C. § 353(a)	*passim*
41 U.S.C. § 353(b)	*passim*
41 U.S.C. § 353(c)	*passim*
41 U.S.C. § 358	*passim*
Regulations:	
29 CFR § 4.5(c)(1) and (2)	*passim*
29 CFR § 4.6(d)(1) and (2)	*passim*
29 CFR § 4.133	5, 6
29 CFR § 4.163(a)	2, 4
29 CFR § 4.163(b)	2
29 CFR § 4.163(k)	4
20 CFR § 4.188(b)(2)	7
46 Fed. Reg. (1981):	
p. 4320	3, 4
p. 4323	4
p. 4341	4
p. 4342	4
p. 4361	4
p. 4363	4

TABLE OF AUTHORITIES—Continued

48 Fed. Reg. (1983):	Page
p. 49736	5
p. 49753	6
p. 49761	4
p. 49762	1, 5
p. 49765	4
p. 49766	4
p. 49788	2
p. 49803	7

REPLY TO BRIEFS IN OPPOSITION*

REPLY TO GOVERNMENT BRIEF IN OPPOSITION

1. The Government now asserts (Opp. 5-6) that because the Secretary of Labor belatedly,[1] by sheer *ipse dixit*, changed his interpretation of Section 353(c) and 358 from recognition that retroactive relief is required from the date of successorship wherever it is found that a contracting agency has erroneously denied coverage (Pet. 3-4, 8-9), to assertion that the Secretary has "discretion" to award retroactive relief (Opp. 6, "may require"),[2] "neither the Secretary nor NASA has a mandatory duty to provide the relief sought by petitioner." (Opp. 5). That argument blatantly begs the question, for it assumes falsely that the Secretary's new claim of "discretion" is "valid." (Pet. 20). Cf. *Batterton* v. *Francis*, 432 U.S. 416, 424, 428 (1977). The only argument for validity (Gov't. Opp. 5) is the demonstrated fallacy that the Secretary has the same "broad discretion" in granting "exemptions" from the wage determination provisions of §§ 358 and 353(c) of SCA, as he does under the Walsh-Healey Act. Pet. 2-3, 8-9, 10, 11, n.25, 12-13, 15, 16-17, *n.34*, 20, *24*.

In its brief to the court below filed July 19, 1983, p. 6, the Government admitted that Sections 358 and 353(c) impose "a mandatory" duty on the Secretary. In oral argument to the District Court on August 30, 1982, Government counsel not only admitted that the "Secretary of Labor has taken the position that Section 353(c)

---

* In this Reply the following abbreviations are used: Petition for Certiorari, "Pet."; Appendix to Petition, "Pet. App."; TWAS' Brief in Opposition, "TWAS Opp."; Federal Respondents' Brief in Opposition, "Gov't. Opp."; briefs of the respective parties in the Court of Appeals, "F.D. C.A. Br."; "TWAS C.A. Br."; and "Pet. C.A. Br."; Appendix to petitioner's reply brief, *infra*, "A."

[1] As of October 27, 1983, 48 F.R. 49762, 29 CFR § 4.5(C), (1) and (2), revised as of July 1, 1984.

[2] The first paragraph of the Government's characterization of 29 CFR § 4.5(C), (1) and (2) (Opp. 5-6), is incomplete and misleading. See also, § 4.6(d)(2), A. 2, 4a, *infra*.

is self-executing" (Tr. 81), but that it was the Secretary's "position" that if the contract "was, at the time of the" successorship, "a Section 353(c) contract," TWAS "would have to pay [the predecessor's] rates *and the Secretary would issue a wage determination that would reflect that*" (Tr. 83). (Emphasis added).[3] The Secretary cannot claim "discretion" to grant exemptions from retroactivity, for implicit in such a claim is au-

---

[3] The Government says (Opp. 7, n. 8, second par.) that since 353(c) "contains no indication that it was intended to supplant the Secretary's discretion to formulate retroactive remedies where the contracting agency incorrectly concluded that the contract was exempt from the Act, it cannot be the source of a mandatory duty * * *." But the denial of "discretion" flows from the parenthetical exception in 353(b), illuminated by the legislative history (Pet. 2-3). Moreover, the argument stands logic on its head. Inasmuch as Section 353(c) is, admittedly, "direct" and "self executing" (see 48 F.R. 49788, § 4.163(a) and (b) and 4a-10a, *infra*), the Secretary can claim no discretion to relieve the successor of his independent statutory retroactive liability. The Government offers no explanation of how, or why, without rejecting that interpretation of § 353(c), the Secretary can claim discretion to deny retroactivity.

Apparently recognizing the difficulty, TWAS belatedly undertakes to challenge DOL's construction (TWAS Opp. 5). But even the "*Final* rule," acknowledges and restates that construction, 4a, *infra*.

TWAS also asserts (TWAS Opp. 10) that the lower courts did not find or assume "the self-executing nature of Section 353(c)." To the contrary, they demonstrably *did*. Both courts held that Section 353(c) is self-executing when coverage is clear; that it is not self-executing *only when* coverage is erroneously disputed by the contracting federal agency and DOL erroneously fails to issue a pre-contract wage determination (Pet. App. 33a-34a, n. 3; 11a, n. 9, 13a-14a). As we have shown, this holding begs the question at the heart of this case—whether power to enforce the law encompasses power illegally *not* to enforce it.

None of the respondents even attempt to answer our demonstration (Pet. 8-9) that historic DOL law and policy preclude making erroneous agency non-coverage determinations a defense to retroactive liability. Nor do they purport to respond to our argument that, on principle and on authorities precisely in point, *ultra vires* agency non-coverage determinations cannot defeat vested private rights of Section 353(c) beneficiaries (Pet. 19-20, 21-23).

thority to repeal the statute by postponement of its effective date (Pet .20, 21-23).[4]

The Government also says (Opp. 5): "The regulations in effect at the time the Secretary made his determination regarding retroactive relief contained no requirement that such relief be granted" (Opp. 5). The Secretary made his determination on August 13, 1982 (Pet. 12).[5] At *that* time, the "Final rule" reflecting the Secretary's historic statutory "interpretation," promulgated on January 16, 1981 (46 F.R. 4320, Pet. App. 156a), *did* require

---

[4] The Government's purported distinction of *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944) (Opp. 7, n. 8), rests on the same question begging assumption that the Secretary *had* discretion. The Secretary had no more discretion to acquiesce in NASA's denial of coverage and waive retroactivity than the Secretary did in *Addison* to "exempt plants with less than seven employees," which was also defended as an exercise of "discretion," *id.* at 619. In both cases the Secretary's claims of discretion to override the statute are *"ultra vires"* (*id.*).

The Government misstates the whole point of *Addison* when it says the Secretary's new regulation *"could be* applied retroactively" (emphasis added). *Addison* held that the new regulation *must* be applied retroactively to avoid the "mischief of producing a result contrary to the statutory design." *Id.* 620-622. In requiring the Secretary to grant retroactive relief, this Court would not even be telling the Secretary to exercise discretion, much less "how to exercise" it; it would be telling him only to discharge the *Addison* "duty laid upon" him "by statute." *Id.* at 622-623 and cases therein cited.

Perhaps not surprisingly, the Government does not even attempt to distinguish the four cases upon which, in addition to *Addison*, we principally relied, *Universities Research Assn.* v. *Coutu*, 450 U.S. 454, 783-784 (1981); *G.L. Christian* v. *United States*, 100 Ct. Cl. 58, 312 F.2d 418, reargument denied, 160 Ct. Cl. 1, 320 F.2d 345, cert. denied, 375 U.S. 954 (1963); *Morrison-Hardeman-Perini-Leavell* v. *United States*, 392 F.2d 988, 997, 183 Ct. Cl. 938 (1968) and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414-416 (1975).

[5] The implication that petitioner amended its complaint to seek retroactive relief to the date of successorship only after the Secretary's determination (Gov't. Opp. 3), is false. Back pay from the date of the successorship was sought in plaintiff's First Amended Complaint filed November 7, 1980. (Record Excerpts in the court below, pp. 10-16).

retroactive relief. 46 F.R. 4320, 4341, § 4.5(c)(1) and (2); 46 F.R. 4342, § 4.6(d)(1) and (2); 46 F.R. 4361, § 4.163(a), (b); 46 F.R. 4363, 4.163(k).[6]

The indented quotation at Opp. 6,[7] which the Government says "explain[s]" the shift from "shall" to "may" in the October 27, 1983, regulations, 46 F.R. 49766, § 4.5 (c)(1) and (2), does not relate to *that* change; instead it appears in the "explanations" section of the January 16, 1981 revision, 46 F.R. 4323, which *retains* the compulsory retroactivity interpretation (46 F.R. 4341).[8] In explaining the reason for its retention (46 F.R. 4341), the Secretary said (46 F.R. 4323):

> The listed court cases are generally cases in which the courts have required incorporation of contract provisions required by law or considered such provisions to be incorporated as a matter of law."[9]

---

[6] A relevant provision, § 4.6(d)(1), not printed in Pet. App. 139a-149a, is printed at 1a, *infra*. On January 29, 1981, the President ordered that the "effective date" of all such regulations be postponed; this was followed by subsequent postponements. Pet. App. 156a. With the exceptions noted, *infra*, §§ 4.5(c)(1) and (2) and 4.6(d) (1) and (2), are unchanged in the October 27, 1983, version. 48 F.R. 49765-6.

The Government's claim (Opp. 6, n. 7) that "clauses to be included in Service Contracts" are "completely unrelated to this issue" is not only illogical gobbledegook, but untrue, as examination of the texts, quoted at 2a-4a, *infra*, show.

[7] The citation to 46 F.R. 4306 (Govt. Opp. 6) is utterly misleading; that page refers to regulations for "Davis-Bacon and Related Acts (minimum wages for federal and federally assisted construction)"; the SCA regulations begin at 46 F.R. 4320.

[8] The Government's argument that admission of historic statutory interpretations and agency policy and practice (48 F.R. 49761-2), contained in both proposed and "Final" regulations prior to October 27, 1983, are to be disregarded because those regulations "never became effective" (Gov't. Opp. 6, n. 7), is far wide of the mark. Such admissions are binding on the agency even though the regulations themselves do not have the force of law. *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976); 5 U.S.C. §§ 553(b)(A), 706(2)(A)(C).

[9] In rewriting § 4.5(c) (1) and (2) in the October 27, 1983, version (2a-3a), to claim discretion not to order retroactivity, the

The shift from "shall" to "may" in 4.5(c)(1) and (2) (48 F.R. 49766) was never mentioned, let alone explained, in the extensive "Supplementary Information" (48 F.R. 49736-49762).

In any event, the claim, based on the October 27, 1983, regulations, of discretion to deny retroactivity, can have nothing to do with this case, because *that regulation states that it shall not apply "to any contract entered into before" December 27, 1983* (48 F.R. 49762). Undoubtedly for this reason, the Government did not cite or rely on the October 27, 1983, regulation in oral argument to the court below on February 27, 1984, and the court below did not consider it (Pet. App. 14a, n.10).[10] Thus, the entire Government argument based on "discretion"[11] is nothing but a diversion designed to distract attention from the rationale below (Pet. 22-23), which respondents do not even purport to defend.[12]

2. The Government argues (Opp. 4, n.4) that because the parties no longer contest the district courts' statutory coverage determination, petitioner's attack upon 29 CFR 4.133 is "superfluous" (Opp. 4; cf. TWAS Opp. 9, Pet. App. 14a, n.10). But Judge Young left a loophole for exemption of "indirect benefit" concession agreements, including visitor information services, through exercise of

---

Secretary significantly deleted the leading case relied on in the January 16, 1981, version, *G.L. Christian & Associates* v. *U.S.*, *supra*.

[10] The court cited for another point, 29 CFR § 4.133 (1983). (Pet. App. 3a, n. 1). The 1983 edition of 29 CFR printed the January 17, 1981, "Final rule."

[11] Contrary to the Government's representation (Opp. 6), whether or not the Secretary had the "discretion" he now claims, he neither articulatedly invoked nor exercised any discretion in issuing his prospective only wage determination. (Pet. 11-12). "[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action." *Motor Vehicle Etc.* v. *State Farm*, 51 L.W. 4953, 4958 (June 24, 1983).

[12] If certiorari is granted, we shall further demonstrate that the argument based on the quotation at Gov't Opp. 6, is utterly untenable. For example, NASA, in insubordinately defying the DOL coverage ruling, cannot be said to have acted in "good faith."

the Secretary's erroneously assumed discretion (Pet. 11 and n.25), and in July, 1983, the Reagan Administration restored the DOL Rules to their original form to take advantage of that loophole, withdrawing DOL's previous confession of error (Pet. 5, n.7, Pet. App. 154a-155a, 156a, 160a).[13] The challenged violation (Pet. App. 14a, n.10), therefore, was not only "capable of repetition" (*Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969)); repetition has already occurred.

In promulgating the October 27, 1983, rules, DOL said it "has determined that exempting visitor information services is not *now* appropriate" (48 F.R. 49753, emphasis added), but reasserts the Secretary's power under § 353(a) and (b) to grant wage determination exemptions for "indirect benefit" concession contracts, even for visitor information services. 48 F.R. 49753, 29 CFR § 4.133. Thus, not only does the dispute over the Secretary's asserted administrative exemption authority itself remain a live justiciable controversy, but respondents cannot "establish that 'there is no reasonable likelihood that [even] the [specific] wrong [exemption of visitor information services], will be repeated,' ". *Iron Arrow Honor Society* v. *Heckler*, 78 L.Ed.2d 58, 63 (Nov. 14, 1983), quoting *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

Moreover, the two-pronged strategy invented by the federal defendants in this case to overrule Congress by administrative usurpation (*ultra vires* denial of coverage "remedied" by prospective only application (Govt. Opp. 6)), is adaptable by all agencies to any act of Congress a current Administration opposes.[14] Refusal to enforce

[13] The October 27, 1983, rules explain that § 4.133 "is in effect an administrative [rather than statutory] exemption." 48 F.R. 49753.

[14] It would be applicable in this case, for example, to DOL's misconstruction of §§ 353(a) and (b) as conferring discretion on the Secretary to decline to make wage determinations and to DOL's unlawful limitation of § 353(c) to predecessors with collective bargaining agreements. (Pet. 31-32).

The Government's *ipse dixit* that our latter claim is "erroneous" (Opp. 7, n. 8, last sentence), in the face of our demonstration that

any law may be defended, as the Government defends here (Opp. 6), by treating prospective only enforcement as a "remedy." Cf. 48 F.R. 49803, 29 C.F.R. § 4.188(b)(2). If administrators can legally grant only prospective "relief" from the date of judicial declaration of error, the administrative misconstruction, rather than the will of Congress, at least *pro tanto*, will prevail in every case.

That tactic must be roundly condemned and rooted out at the earliest opportunity by this Court, for it constitutes the cutting edge of a subversive movement from legislative to executive supremacy. What distinguishes our Constitutional system from despotism is that executive agencies are not " 'Poo[h] Bah[s]' [free] to loose or bind at will." *NLRB* v. *Dorsey Trailers, Inc.*, 179 F.2d 589, 591 (5 Cir., 1950). To assure that this remains so, "[t]he determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested." *Addison, supra*, 322 U.S. at 616. As this Court recently recognized in *Bose Corporation* v. *Consumers Union*, 52 L.W. 4513, 4520 (April 30, 1984), it is "particularly members of this Court" who are charged with preserving our "precious liberties" by requiring bureaucrats, from the President down, to obey the law.[15]

3. The Government defends as "unreviewable" the lower court's denial of mandamus insofar as it was based on "equitable considerations" (Opp. 7-8). But, as demonstrated in our Petition (27-28), the question of retroactivity to the date of successorship is one of law, not equitable discretion. If coverage exists from the inception of the successorship, and if § 353(c) is "direct" and "self-executing," retroactivity is automatic.[16]

DOL misread the statute and misquoted the very legislative history on which it relies (Pet. 31-32), is arrogance, not argument.

[15] Thus, the issue is not merely "remedial," in the usual sense, as TWAS would have it (TWAS Opp. 9).

[16] Even if retroactivity were a matter of equitable discretion, it would be the court's "judgment * * * guided by sound legal principles," not the court's "feel[ings]" (TWAS Op. 9), or "inclination,"

The Government argues (Opp. 8) that TWAS was "severely disadvantaged by petitioner's failure to press its claim prior to the award of the new contract," and that, if TWAS was to get the "new contract," it "had to bid on the assumption that the contract was not covered by the Act." The shortest answer is that "[e]conomic necessity is not recognized as a commercial impracticability defense to a breach of contract claim." *W.R. Grace & Co.* v. *Local Union 759, Etc.*, decided May 31, 1983, 51 L.W. 4643, 4646, n.12. The more elaborate answer is that when, before November 8, 1978, NASA told TWAS that "SCA will not apply to VIC" (Pet. 6), TWAS could have immediately sued for a declaratory judgment based on DOL's controlling contrary position (Pet. 5-7), and "requested a stay" (*Grace, supra, id.*), of bidding or letting of any contract on the Mod 9 concession, pending resolution of the coverage question. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 152-154 (1967). Having obtained the Mod 9 modification on terms which it knew, or should have known, were illegal, and having failed to take the steps it could have taken to protect itself, TWAS cannot be heard to complain that petitioner's "delay" or "lethargy" in suing to establish coverage was responsible for its obligation to pay its employees their long overdue wages. (Pet. 28, n.42). "The Union was not its adversary's keeper" (*id.*). Awarding retroactivity only from the date of a court coverage decision allows the successor to bet its employees' legally accrued wages and fringe benefits against coverage--heads I win, tails you lose.

DOL's view has always been that a successor's obligation retroactively to compensate its employees for underpayments from the inception of the successorship is applicable even to "entrapped successors" who are wholly "without fault." 5a-9a, *infra*. Their remedy, as DOL has historically recognized, lies in the Court of Claims. (Pet. 8-9, 22-23).

---

that was called for. *Albemarle Paper Co., supra*, 422 U.S. at 416. Substitution of the lower courts' "feelings" for "judicial discretion," in the teeth of *Albemarle*, is but one of the outrageous abuses which require exercise of this Court's supervisory power.

REPLY TO TWAS BRIEF IN OPPOSITION

1. TWAS protests that the Eleventh Circuit cannot be guilty of wholesale defiance of this Court's precedents because every lower court which has adjudicated the issue has denied that § 353(c) is enforceable by private action (TWAS Opp. 4-5, 6, cf. Gov't. Opp. p. 4, n.5). To recapitulate, none of those courts confronted the fact that § 353(c) is, by its plain terms, as well as by historic DOL interpretation, "direct" and "self-executing"; all either ignored completely or egregiously misread the legislative history, which confirms Congress' intentional extirpation of *all* of the Secretary's discretionary exemption power over wage determinations (Pet. App. 34a); all relied on SCA cases antedating 1972, when Congress, for the first time, created vested private rights in successor employees and their bargaining agents (Pet. 9); all applied the *Cort* v. *Ash* approach to the pre-*Cort* v. *Ash* amendment in the teeth of *Merrill Lynch, Pierce, Fenner and Smith* v. *Curran* (Pet. 24-25) and *Jackson Transit Authority* v. *Transit Union* (Pet. 30-31); and, last, but by no means least, none even mentioned the controlling *Coutu* distinction (Pet. 23, n.39, 34-25).[17]

---

[17] TWAS argues that this Court need not trouble to grant certiorari because if Congress had considered the "no private cause of action" cases wrong, it had opportunity to overrule them by legislation (TWAS Opp. 7-8). But the 1981 hearings (TWAS Opp. 7) focused on the newly proposed Reagan Administration DOL regulations, and recommended that they be "withdrawn" (Pet. App. 191a, see also 184a-185a, see also, TWAS Opp. A7-A11). The private right of action issue was not considered by the Committee and none of the cases cited by TWAS (Opp. 4) was even mentioned. The only here relevant decision discussed was Judge Moore's coverage decision (Pet. App. 184a-185a), which was regarded as again proving administrative usurpation. At best, this history shows that Congress left the private right of action issue for this Court to resolve under its pre-*Cort* v. *Ash* precedents.

The only relevant Court of Appeals pronouncement which had been issued before commencement of the hearings was the *Hodgson* dictum (Pet. 9a). While it is technically true that *Philco-Ford* "issued during the course of the 1981 oversight hearings" (TWAS Opp. 8), that decision issued November 16, 1981, after the first two days of the interrupted three day hearing had ended (TWAS Opp.

2. While raised pro forma in TWAS' answer to the Union's Supplemental and Second Amended Complaint, TWAS' standing objection admittedly (TWAS C.A. Br. p. 14, n.1), was not "argued" in the district court and was therefore treated as having been abandoned by Judge Kovachevich and by the Court of Appeals. The point is footless in any event because District Lodge No. 166 obviously has standing to litigate on behalf of its constituents SCA coverage and remedy issues which are at the root of its federal collective bargaining function as exclusive representative for wages and fringe benefits of the successor employers' employees (Pet. 4-5, 7, 9-10). 29 U.S.C. § 185(b); *Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963); *International Ass'n of Mach. & Aero. Wkrs.* v. *Hodgson*, 515 F.2d 373, 377 (App. D.C. 1975).[18]

3. Instead of confessing error, TWAS would deny the authority of this Court's holding in *Jackson*, *supra*, 457 U.S. at 22, that "contractual rights created by federal statutes" are judicially enforceable, "despite the fact that the relevant statutes lacked provisions creating federal causes of action."[19] Indeed, the "incorporation by operation of law" rule was the predicate of *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 457 (1957): "The Labor Management Relations Act [LMRA] expressly furnishes some substantive law.[20] It points out what the parties

---

7), and was apparently not reported until after the third day, December 10, 1982 (*id.*).

[18] The point stressed by TWAS and the courts below (TWAS Opp. 3, Pet. 3a, 19a, see also Gov't Opp. 2, n. 1), that no employee suffered a loss of jobs or cut in pay as a result of the breach of § 353(c), is an *ad hominem* irrelevancy. The legislative history shows that Congress was intent on preventing successors from cutting predecessors' wage scales, regardless of the effect on particular employees (118 Cong. Rec. 27,138-27,139, Pet. 88a-89a, 92a, 97a, 101a). 4a *infra*. *Clark* v. *Unified Services, Inc.*, 659 F.2d 49, 53 (5th Cir. 1981).

[19] The holding was exactly *contra* (Pet. App. 10a-11a). That holding is in square conflict with *Machinists* v. *Central Airlines, supra*, and the other cases discussed in *Jackson*, 457 U.S. at 22-23.

[20] Under LMRA, employee rights are enforceable only at the instance of the General Counsel of the Board, not at the instance

may or may not do in certain situations." Therefore, whether or not § 353(c) and § 358 of the SCA create a private right of action is irrelevant; it suffices that those sections "point[] out" what the collective bargaining parties "may not do" in "successor" situations, *i.e.*, they may not agree to lower wage and fringe benefits than the predecessor's (Pet. 9-10).[21]

CONCLUSION

The Oppositions, by failure effectively to deny, confirm the importance of the questions presented. Accordingly, certiorari should be granted.

Respectfully submitted,

MOZART G. RATNER
Counsel of Record
1900 M Street, N.W.
Washington, D.C. 20036

JOSEPH P. MANNERS
General Counsel
IAMAW
1300 Connecticut Ave., N.W.
Washington, D.C. 20036

GEORGE H. TUCKER
MANNERS, TUCKER, CARRILLO
& DAMOORGIAN, P.A.
123 Northwest 12th Avenue
Miami, Florida 33128
Attorneys for Petitioner

February 4, 1985

---

of employees or unions. See *NLRB* v. *Sears Roebuck & Co.*, 421 U.S. 132, 138-139 (1975).

[21] TWAS' attempt to evade *Jackson* on the theory that there Congress clearly "intended to create contractual rights" and the only issue was whether the contractual rights it intended to create were federal or state rights (TWAS Opp. 10-11), is frivolous. There is in this case no possible suggestion that Congress intended to relegate to state law governance collective bargaining agreements which "are creations [and subjects] of federal law and bound to the statute [SCA] and its policy." *Jackson*, at 23, quoting *Machinists* v. *Central Airlines*, 372 U.S., at 692 and distinguishing *Norfolk & Western R. Co.* v. *Nemitz*, 404 U.S. 37 (1971); 415 U.S. at 23, n. 9.

APPENDICES

APPENDIX 1

Supplemental Provisions "Final rule,"
46 Federal Register 4320, January 16, 1981,
29 CFR Part 4*

[4320] Action: Final rule.

* * * *

Effective Date: February 17, 1981

* * * *

[4341]

§ 4.6 Labor standards clauses for Federal service contracts exceeding $2,500

* * * *

(d) (2) If this contract succeeds a contract, subject to the service Contract Act of 1965 as amended under which substantially the same services were furnished and service employees were paid wages and fringe benefits provided for in a collective bargaining agreement, *in the absence of the minimum wage attachment for this contract setting forth such collectively bargained wage rates and fringe benefits,* neither the contractor nor any subcontractor under this contract shall pay any service employee performing any of the contract work (regardless of whether or not such employee was employed under the predecessor contract), less than the wages and fringe benefits provided for in such collective bargaining agreements, to which such employee would have been entitled if employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for under such agreement. * * * (Emphasis added.)

---

* The following provision does not appear in the Appendix to the Petition, pp. 139a-149a.

APPENDIX 2

48 Federal Register 49736-49762 (Explanation)

49762-49805 (Text) October 27, 1983, 29 C.F.R. Part 4, revised as of July 1, 1984

[all emphasis is added]

[48 F.R. 49736] Action: Final rule * * *.

[29 CFR Part 4, pp. 46-49]

§ 4.5

(c) (1) If the notice of intention required by § 4.4 is not filed with the required supporting documents within the time provided in such section, the contracting agency shall, through the exercise of any and all of its power and authority that may be needed (including, where necessary, its authority to negotiate, its authority to pay any necessary additional costs, and its authority under any provision of the contract authorizing changes), include in the contract any wage determinations communicated to it by the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, within 30 days of the receipt of such wage determination(s). With respect to any contract for which section 10 of the Act requires an applicable wage determination, the Administrator *may* require retroactive application of such wage determination.

(2) Where the Department of Labor discovers and determines, whether before or subsequent to a contract award, that a contracting agency made an erroneous determination that the Service Contract Act did not apply to a particular procurement and/or failed to include an appropriate wage determination in a covered contract, the contracting agency, within 30 days of notification by the Department of Labor, *shall include in the contract the stipulations contained in § 4.6* and any applicable wage determination issued by the Administrator or his author-

ized representative through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination). With respect to any contract subject to Section 10 of the Act, the Administrator *may require retroactive application of such wage determination.* (See 53 Comp. Gen. 412 (1973): *Curtiss-Wright Corp.* v. *McLucas*, 381 F.Supp. 657 (D NJ 1974); *Marine Engineers Beneficial Assn., District 2* v. *Military Sealift Command*, 86 CCH Labor Cases ¶ 33,782 (D DC 1979); *Brinks, Inc.* v. *Board of Governors of the Federal Reserve System*, 466 F. Supp. 112 (D DC 1979), 466 F. Supp. 116 (D DC 1979).) (See also 32 CFR 1-403.)

* * * *

§ 4.6

(C) (v) *The wage rate and fringe benefits finally determined pursuant to paragraphs (b)(2) (i) and (ii) of this section shall be paid to all employees performing in the classification from the first day on which contract work is performed by them in the classification.* Failure to pay such unlisted employees the compensation agreed upon by the interested parties and/or finally determined by the Wage and Hour Division *retroactive to the date such class of employees commenced contract work* shall be a violation of the Act and this contract.

(vi) Upon discovery of failure to comply with paragraphs (b) (2) (i) through (v) of this section, the Wage and Hour Division shall make a final determination of conformed classification, wage rate, and/or fringe benefits *which shall be retroactive to the date such class of employees commenced contract work.*

* * * *

(d) (1) In the absence of a minimum wage attachment for this contract, neither the contractor nor any subcon-

tractor under this contract shall pay any person performing work under the contract (regardless of whether they are service employees) less than the minimum wage specified by section 6(a)(1) of the Fair Labor Standards Act of 1938. *Nothing in this provision shall relieve the contractor or any subcontractor of any other obligation under law or contract for the payment of a higher wage to any employee.*

(2) If this contract succeeds a contract, subject to the Service Contract Act of 1965 as amended, under which substantially the same services were furnished in the same locality and service employees were paid wages and fringe benefits provided for in a collective bargaining agreement, *in the absence of the minimum wage attachment for this contract setting forth such collectively bargained wage rates and fringe benefits, neither the contractor nor any subcontractor under this contract shall pay any service employee performing any of the contract work (regardless of whether or not such employee was employed under the predecessor contract), less than the wages and fringe benefits provided for in such collective bargaining agreements, to which such employee would have been entitled if employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for under such agreement.* * * *

§ 4.163 Section 4(c) of the Act.

(a) * * * Under this provision, the successor contractor's sole obligation is *to insure* that all service employees are paid no less than the wages and fringe benefits to which such employees would have been entitled if employed under the predecessor's collective bargaining agreement (i.e., *irrespective of whether the successor's employees were or were not employed by the predecessor contractor*). * * *

(b) *Section 4(c) is self-executing.* Under section 4(c), a successor contractor in the same locality as the predecessor contractor *is statutorily obligated* to pay no less than the wage rates and fringe benefits which were contained in the predecessor contractor's collective bargaining agreement. *This is a direct statutory obligation and requirement placed on the successor contractor by section 4(c) and is not contingent or dependent upon the issuance or incorporation in the contract of a wage determination based on the predecessor contractor's collective bargaining agreement.* * * *

APPENDIX 3

[SEAL]

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, D.C. 20210

Case No. SCA-352-355

IN THE MATTER OF EASTERN SERVICE MANAGEMENT COMPANY and BROADUS THOMPSON, President of Eastern Service Management Company and Individually,
Respondents

[Filed Dec. 17, 1974]

Appearances:

Joe D. Sparks, Trial Attorney
Office of the Solicitor
U.S. Department of Labor
Room 339
1371 Peachtreet Street, N. E.
Atlanta, Georgia 30309
For the Government

Julian H. Gignilliat, Attorney
1202 Barringer Building
Columbia, South Carolina 29201
For the Respondents

Before: RHEA M. BURROW
Administrative Law Judge

DECISION AND ORDER

This is a proceeding under the McNamara-O'Hara Service Contract Act (41 U.S.C. 351, et seq.), hereinafter referred to as the Act which was initiated upon the is-

suance of the complaint by the Deputy Solicitor of Labor on July 18, 1974.

* * * *

[7] *Conclusions of Law*

* * * *

[8] 3. * * * In the absence of a showing that bargaining was not at arms length or that the wages in the agreement were at substantial variance from those which prevailed for services of a character similar in the locality, Section 4(c) must be considered to be a self-executing statutory provision of the Act. Also, under applicable regulatory authority 29 C.F.R. 4.165(c) the prevailing rate established by a wage determination is a minimum rate. The employer or contractor is required to pay the rate specified in the wage determination or the collective bargaining agreement, whichever is the higher, insofar as it affects the wages and fringe benefits of service employees on a contract subject to wage determination. Respondents violated Section 4(c) of the Act in that they failed to pay wages and fringe benefits provided for in a collective bargaining agreement to which their employees would be entitled if they were employed under the predecessor contract.[2]

* * * *

[11] (c) The amount of the underpayments of vacation pay to the service employees shown in Paragraph VII hereof total $2,319.44 and the amount due service employees by reason of Respondent's failure to pay the prospective wage and fringe benefits increase provided in the collective bargaining agreement is $16,572.60 or a total of $18,892.04.

The $16,572.60 underpayment resulted from an entrapped successor contractor situation wherein the wage

---

[2] [Quotation of Section 4(c) of the Act omitted.]

* * * *

increase provided in a predecessor collective bargaining agreement was not reflected in the invitational bids or wage determination for renewal of the contract and its performance for the subsequent one year renewal. Respondents thus became liable for prospective wage and fringe benefit increased payments to service employees that had not been encompassed in their estimated costs when they bid on the contract. The Respondents without fault on their part became victims of an entrapment situation over which they had no control.

[12] The record does not show that the $16,572.60 due service employees by reason of Respondents failure to pay the prospective wage and fringe benefit increases provided in the predecessor Nash-Union collective bargaining agreement has been paid or that the circumstances relating to failure to pay certain employees their vacation pay were extenuating. In this connection there does not appear to be a genuine effort and desire on the part of the Respondents to comply with the statute and regulations as they pertain to payment of wages and fringe benefits to their service employees.

It is thus concluded that the record does not depict unusual circumstances justifying relief from the ineligible list provisions of Section 5(a) of the Act.

* * * *

APPENDIX 4

[SEAL]

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, D.C. 20210

Case No. SCA-352-355

IN THE MATTER OF EASTERN SERVICE MANAGEMENT COMPANY and BROADUS THOMPSON, President of Eastern Service Management Company and Individually,
Respondent

[Filed Apr. 8, 1975]

Appearances:

Joe D. Sparks, Trial Attorney
Office of the Solicitor
U.S. Department of Labor
Room 339
1371 Peachtree Street, N.E.
Atlanta, Georgia 30309
For the Government

Julian H. Gignilliat, Attorney
1202 Barringer Building
Columbia, South Carolina 29201
For the Respondents

Before: RHEA M. BURROW
Administrative Law Judge

SUPPLEMENTAL DECISION AND ORDER

* * * *

[3] The $8,485.48 underpayment resulted from an entrapped successor contractor situation wherein the wage

increase provided in a predecessor collective bargaining agreement was not reflected in the invitational bids or wage determination for renewal of the contract and its performance for the subsequent one year renewal. Respondents thus became liable for prospective wage and fringe benefit increased payments to service employees that had not been encompassed in their estimated costs when they bid on the contract. The Respondents without fault on their part became victims of an entrapment situation over which they had no control.

The record does not show that the $8,485.48 due service employees by reason of Respondents failure to pay the prospective wage and fringe benefit increases provided in the predecessor Nash-Union collective bargaining agreement has been paid or that the circumstances relating to failure to pay certain employees their vacation pay were extenuating. In this connection there does not appear to be a genuine effort and desire on the part of the Respondents to comply with the statute and regulations as they pertain to payment of wages and fringe benefits to their service employees.

* * * *

APPENDIX 5

EXCERPT FROM LETTER TO UNIDENTIFIED COMPANY, DATED JULY 18, 1983, FROM DOROTHY P. COME, ASSISTANT ADMINISTRATOR, WAGE AND HOUR DIVISION, FOR WILLIAM M. OTTER, ADMINISTRATOR

* * * *

[2] [S]ection 4(c) is a self-executing provision of the Service Contract Act and its requirements are enforceable as a matter of law notwithstanding the fact that the applicable SCA wage determination is not included in the contract. Thus, * * *, as the successor contractor, is obligated by law to pay its employees no less than the wage rates and fringe benefits provided in the predecessor contractor's collective bargaining agreement and reflected in * * *. In view of the circumstances in this case, we are again requesting GSA to take all appropriate action to retroactively incorporate * * * into this contract. You can be assured that while we are and have been making every effort to carry out our responsibility for protecting labor standards mandated by the statute, we are also cognizant of your concerns and are seeking a resolution of it that will safeguard the interests of all parties.